

#### NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX

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RETIRED JUDGES

March 3, 2015

Jonathan P. Sheldon, Esq. Sheldon, Flood & Haywood, PLC 10621 Jones St. Suite 301-A Fairfax, VA 22030

Eugene Murphy, Esq. Senior Assistant Attorney General Office of the Attorney General 900 East Main Street Richmond, VA 23219

> Re: <u>Adam Robert Blackington v. Commonwealth of Virginia;</u> Case No. CL-2013-18691

Dear Counsel:

This matter is before the Court on the Petition for a Writ of Habeas Corpus filed by Petitioner Adam Robert Blackington and the Commonwealth's Motion to Dismiss. For the reasons stated below, the Commonwealth's Motion to Dismiss will be granted.

#### Background

On October 17, 2011, the petitioner Adam Robert Blackington ("Mr. Blackington") pleaded guilty to one count of using a computer to solicit a minor to commit sodomy in violation of Va. Code Ann. § 18.2-374.3(E).

## OPINION LETTER

DENNIS J. SMITH, CHIEF JUDGE JANE MARUM ROUSH R. TERRENCE NEY RANDY I. BELLOWS CHARLES J. MAXFIELD BRUCE D. WHITE ROBERT J. SMITH DAVID S. SCHELL JAN L. BRODIE LORRAINE NORDLUND BRETT A. KASSABIAN MICHAEL F. DEVINE JOHN M. TRAN GRACE BURKE CARROLL JUDGES Mr. Sheldon Mr. Murphy <u>Blackington v. Commonwealth</u> Case No. CL-2013-18691 March 3, 2015 Page 2

The facts of the case as proffered by the Commonwealth were that in 2010, when Mr. Blackington was 20 years old, he used the Internet to solicit oral sex from a 16 year old. On December 16, 2011, Mr. Blackington was sentenced to 12 months of incarceration, all suspended, with two years of active probation. As a special condition of probation, Mr. Blackington was ordered to submit to a substance abuse evaluation and a mental health evaluation and to follow whatever requirements his probation officer might impose for substance abuse treatment or mental health counseling. He was ordered to have no contact with the victim.

On December 16, 2013, Mr. Blackington filed his Petition for a Writ of Habeas Corpus. In the petition, he alleges that his conviction is void *ab initio* because Virginia's sodomy statute, Code §  $18.2-361(A)^1$ , is facially unconstitutional under <u>Lawrence v. Texas</u>, 539 U.S. 558 (2003) and the Due Process Clause of the Fourteenth Amendment. In support of his argument, Mr. Blackington relies on <u>MacDonald v. Moose</u>, 701 F.3d 154, (4<sup>th</sup> Cir. 2013). In that case, the Fourth Circuit ruled that Code § 18.2-361(A) is facially unconstitutional.

This court took the matter under advisement. In the meantime, the Supreme Court of Virginia granted an appeal in three cases in which it was asked to decide the constitutionality of Code § 18.2-361(A) in light of Lawrence v. Texas, *supra*, and MacDonald v. Moose, *supra*. This court has deferred ruling on this case until the Supreme Court of Virginia ruled on the issue of the constitutionality of Code § 18.2-361(A).

Rejecting the Fourth Circuit's reasoning in <u>MacDonald v. Moose</u>, the Virginia Supreme Court held in <u>Toghill v. Commonwealth</u>, \_\_\_\_ Va. \_\_\_\_, \_\_\_ S.E.2d \_\_\_\_ (Record No. 140414, February 26, 2015), that Code § 18.2-361(A) is not facially unconstitutional or unconstitutional as applied to an adult charged with using the Internet to solicit of a minor to engage in sodomy.<sup>2</sup> <u>See also McDonald v. Commonwealth</u>, 274 Va. 249 (2007).

The other two cases in which an appeal was granted were disposed of by unpublished orders. <u>See Saunders v. Commonwealth</u>, (Record No. 140507, Order dated February 26, 2015), <u>McClary v. Commonwealth</u>, (Record No. 140785, Order dated February 26, 2015). Both <u>Saunders</u> and <u>McClary</u> followed the holding of <u>Toghill</u>.



<sup>&</sup>lt;sup>1</sup> In 2014, the General Assembly amended Code § 18.2-361(A) to remove the general provisions forbidding sodomy. Any references to Code § 18.2-361(A) in this letter refer to the statute as it existed in 2010, the time of Mr. Blackington's offense.

Mr. Sheldon Mr. Murphy <u>Blackington v. Commonwealth</u> Case No. CL-2013-18691 March 3, 2015 Page 3

The Supreme Court of Virginia's holding in <u>Toghill</u> is dispositive in this case. As noted in <u>Toghill</u>, <u>Lawrence v. Texas</u> "simply does not afford adults with the constitutional right to engage in sodomy with minors." Slip Opinion at p. 11.

Applying the holding of <u>Toghill</u>, this court concludes that Code § 18.2-361(A) is not unconstitutional as applied to Mr. Blackington. His conviction for violating § 18.2-374.3(E) by using the Internet to solicit a minor to commit oral sodomy in violation of Code § 18.2-361(A) is not void *ab initio*.

#### Conclusion

For the reasons stated above, this court will grant the Commonwealth's Motion to Dismiss Mr. Blackington's Petition for Habeas Corpus Relief. An order reflecting this ruling has been entered (copy attached).

Sincerely,

Jane Marum Roush

# OPINION LETTER



### IN THE CIRCUIT COURT OF FAIRFAX COUNTY

)

| Adam Robert Blackington,  |  |
|---------------------------|--|
| Plaintiff,                |  |
| V.                        |  |
| Commonwealth of Virginia, |  |
| Respondent.               |  |

Case No.: CL-2013-18691

### FINAL ORDER

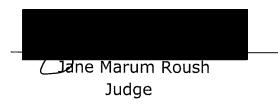
THIS MATTER is before the court on the plaintiff's Petition for Writ of Habeas Corpus and the Respondent's Motion to Dismiss.

For the reasons stated in this court's opinion letter dated March 3,

2015, which is incorporated herein by reference, the Respondent's Motion to Dismiss is hereby GRANTED.

This matter is final.

ENTERED this 3<sup>rd</sup> day of March, 2015.



Signatures of Counsel of Record Waived Pursuant to Rule 1:13